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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 605

BEACON MILLING COMPANY,

Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

RESPONDENT'S OPPOSING BRIEF

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November 13, 1944.

PRESS OF FREMONT PAYNE, INC.

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Official Report of Opinion Below

The opinion of the Court of Appeals of the State of New York, *New York Central R. Co.* v. *Beacon Milling Co., Inc.*, is reported in 293 N. Y. 218.

Jurisdiction of this Court

Respondent maintains that the judgment sought to be reviewed is not a final judgment reviewable on certiorari.

Both parties moved for a summary judgment in the trial court (R. 8-10). The trial court granted petitioner's motion and entered judgment dismissing the complaint (R. 24). Respondent appealed the granting of petitioner's motion but not the denial of its own motion,

hence upon reversal the Court of Appeals merely directed in its remittitur that petitioner's motion for summary judgment be denied (R. 57). As the case now stands, no judgment, final or otherwise, has been entered in favor of the respondent. The case awaits trial on the merits.

It may be that in respect to the issues already raised there is, as petitioner claims, page 3 of its brief, a final opinion of the Court of Appeals. However, the statute, Title 28 U. S. C. § 344(b), refers to a final judgment or decree, not a final opinion. It is for the trial court to determine, when the issue is presented to it for determination, whether judgment should be entered for respondent. Until such judgment is entered petitioner has not been hurt.

There is nothing to the contrary in *Department of Banking* v. *Pink,* 317 U. S. 264, cited by petitioner on page 3 of the petition. That case deals only with judgments issued upon full adjudication, not with judgments which merely set aside orders of dismissal. Something remains to be done in this case which is more than ministerial. It remains for the trial judge to exercise his informed discretion as to whether respondent is now entitled to judgment on the stipulated facts. Respondent believes that it is entitled to such judgment, but that until the judgment is entered in the trial court there cannot be said to be a final judgment, and even then it will not be a final judgment of the highest court of the state.

Statement of the Case

This is a suit by a railroad company to recover freight charges upon interstate shipments assessed in accordance with its duly filed and published tariffs. No issue is presented in respect to the filing or interpretation of the tariffs, the parties being agreed that the

tariffs were duly filed with the Interstate Commerce Commission and that the charges are correctly computed under the tariffs. The petitioner, without having previously secured a determination in its favor from the Interstate Commerce Commission, seeks to have the court look behind the published tariffs and determine that, insofar as the petitioner is affected, the tariffs were issued in violation of an order of the Interstate Commerce Commission and are, therefore, unlawful. Respondent, while denying that its tariffs were issued in violation of any order of the Commission, contends that the terms of the tariff are controlling in any event, and that the rates named therein were the legal rates which respondent must charge and collect.

The petitioner, sometimes hereinafter called Beacon, has a plant at Cayuga, New York, located on respondent's line of railroad, with a connection also to the Lehigh Valley Railroad, and there manufactures animal and poultry feed from various ingredients, chiefly grain. The grain is shipped to Cayuga by rail and is there accorded "transit" under the provisions of respondent's tariffs. By paying the inbound charges and claiming transit on the grain Beacon is permitted to use it in manufacturing mixed feed and ship out the product on the through rate applying from the point of origin of the grain to the ultimate destination of the mixed feed, securing, in that event, a refund of the inbound charges previously paid. The identity of the grain is not preserved. Transit is valuable to Beacon because it is thereby permitted to pay the through rates which are normally much less than the sum of the rates to and from Cayuga.

Where one commodity, such as grain, moves into a transit point and another commodity, such as mixed feed, moves out of a transit point, and the rates on the two commodities differ, what through rate will be applicable

is important. It is important to the transit operator, not only in respect to how much he himself pays, but also in respect to what his competitors at other points are paying, for if his through charges are on a higher basis than theirs he is at a competitive disadvantage.

Such a competitive disadvantage faced Beacon in 1929 and gave rise to the Commission's order which Beacon now claims invalidated the tariff provisions under which the charges sued for in this suit were levied. Beacon complained to the Interstate Commerce Commission that its competitors at Lancaster and York, Pennsylvania, Buffalo, New York, Toledo, Ohio, and Chicago and Peoria, Illinois, had in their transit operations the benefit of the grain basis of through rates in shipping to eastern destinations, while Beacon had to pay the higher mixed feed basis in making its shipments to the same destinations. Beacon's competitors were for the most part located in Central Territory where the carriers had voluntarily established a rule that the through charges would be those applicable on grain, the inbound commodity. Beacon, whose plant was at Cayuga in Eastern Territory, was subject to the so-called Trunk Line rule which required the assessment of through charges on the basis of the outbound commodity, which was mixed feed, and took a higher rate.

Beacon's complaint to the Commission alleged that the arrangement resulted in aggregate transportation charges which were unreasonable, prejudicial and discriminatory, in violation of the Interstate Commerce Act. The Commission sustained Beacon's complaint, finding in *Beacon Milling Co., Inc.* v. *New York Central R. Co.*, 157 I. C. C. 635 (October 10, 1929), that under the circumstances it was unreasonable to assess Beacon's through charges on the mixed feed basis while its competitors had the grain basis. The report points out, pages 639-40, that the Lehigh Valley Railroad, one of

the defendants, gave none of its shippers at other points a more favorable arrangement than it accorded Beacon at Cayuga, but that the New York Central did by joining in tariffs carrying the Central Territory rule at Peoria, Chicago, Toledo and Buffalo.

The order required the establishment of the Central Territory rule at Cayuga. The relevant portion of the order, which is quoted in part only on page 4 of petitioner's brief, required the carriers—

> "* * * to establish, * * * and thereafter to maintain and apply transit rules, regulations and practices with respect to the transportation of grain, grain products and grain by-products from points in central, southern and western territories to Cayuga, N. Y., there manufactured into mixed feed and shipped to destinations in eastern territory and New England, the same as the transit rules, regulations and practices now published in Agent B. T. Jones's I. C. C. No. 2069, in effect in central territory" (R. 30).

While the result of the order was to place Beacon's through charges on the grain basis, the grain basis was but a means to an end, namely, the placing of Beacon on an equal competitive footing with its competitors in other territories. The order was to continue until further order of the Commission.

The charges sued for arose out of the Commission's order in *Emergency Freight Charges, 1935, Ex Parte 115,* 208 I. C. C. 4 (March 26, 1935), and subsequent proceedings in the same case, 215 I. C. C. 439 (June 9, 1936).

In August of 1934 the carriers of the entire country, being faced with a financial emergency, filed a petition with the Interstate Commerce Commission seeking permanent increases in their freight rates and charges. The Commission, while disapproving the carriers' application for permanent increases, did approve a plan of

limited, temporary increases on specific services and commodities to be levied in addition to and apart from the prevailing rates and charges. These emergency charges, so-called, which were approved by the Commission were limited to selected commodities listed in the appendix to the Commission's report. Part 3 of the appendix listed, among other commodities, wheat, corn, barley, rye, rice, grain, etc., here collectively called grain, as commodities on which no line haul emergency charges were authorized (R. 37). Part 4 of the same appendix listed "Feed, animal or poultry, * * *" as taking the maximum emergency charges of three cents per 100 pounds (R. 43). The basis for this controversy was thus laid, since an emergency charge was authorized on animal or poultry feed, the outbound commodity shipped by Beacon, but not on grain, its principal inbound commodity.

The emergency charges were authorized though not prescribed by the Commission, and the carriers could accept or reject the Commission's proposal as they saw fit. However, since the Commission, as permitted by Section 6 of the Interstate Commerce Act, undertook in advance to relax its rules pertaining to tariff publications and permit tariffs containing the emergency charges which it had authorized to go into effect almost immediately in blanket supplements to existing tariffs and without suspension, the carriers were, for practical reasons, impelled to accept the Commission's proposal in order to obtain a general increase in their rates. "It should be clearly understood", said the Commission at page 59 of its report (208 I. C. C. 4), "that the plan of emergency charges here provided is permissive in character."

The order of the Commission modified all outstanding orders authorizing or prescribing rates and charges—

> "* * * to the extent necessary to permit the emergency charges herein authorized to be applied to the

rates and charges authorized or prescribed in or maintained or held by virtue of said outstanding orders; but that in all other respects said orders shall remain in full force and effect unaffected by this order'' (R. 50-51).

The plan for putting the emergency charges into immediate effect contemplated the filing and publishing of a single master tariff naming the charges and the rules for their application. This tariff was for general use throughout the country by all carriers. Item No. 70 in the master tariff, which is quoted in full in Appendix A,* provided a rule to cover all transit situations regardless of the commodity, the type of transit, the carrier involved, or the location of the transit point. The rule, so far as material here, provided in substance that where transit was accorded and an emergency charge was provided on either the inbound or outbound commodity, an emergency charge would be assessed on the through rate.

The master tariff which carried Item 70 became applicable to particular carriers by virtue of the filing of individual tariffs by such carrier incorporating the master tariff by reference. The emergency charges expired by limitation December 31, 1936. It is not disputed in this case that the respondent filed tariffs which made the rules of the master tariff applicable to Beacon's shipments and that the charges sued for were levied under Item 70 thereof.

No Question of Tariff Interpretation is Involved

There runs throughout the petition and brief a suggestion or inference that a question of tariff interpretation is involved in the case. There is repeated reference, for in-

* By stipulation in this proceeding (R. 59) tariffs were not reproduced in the Transcript of Record, but may be referred to by either party, and, to the extent referred to, are to be printed verbatim by said party in its brief. The record reference of "R. Appendix 86", supplied for Item 70 of the tariff at the top of page 12 of petitioner's brief refers to the record before the state court, not the record before this Court.

stance, to this Court's decision in *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, a decision that deals with construction of tariffs by courts. In referring to the case on page 16 of its brief, Beacon says:

> "There, as here, the carrier's contention was that courts are without jurisdiction over cases involving a disputed question of tariff construction unless there had been preliminary resort to the Commission."

This thought is followed up with two extracts from the case dealing entirely with tariff construction and still further with an extract from another case dealing exclusively with that feature. All of this implies that there is an issue of tariff interpretation here.

The fact is that there is no dispute, and never has been throughout the course of this litigation, as to the interpretation of the tariffs under which the charges sued for were levied. Indeed, the brief filed in this Court states, page 11:

> "It is not denied that the New York Central in incorporating in its tariffs the rate increases assumed to have been authorized by the Commission in *Emergency Freight Charges, 1935,* did so publish its rates and charges as to make the emergency increases so authorized with respect to mixed feed applicable to the transportation of Beacon's property. Indeed, the manner of publication of the increases was such that the shipper could not escape them, whether the charges assessed against him were based upon the rates on the inbound raw material, or upon the rates on the outbound mixed feed."

This is followed by a quotation from the tariff itself showing that there could be no dispute under its plain language, the full text of which is quoted in Appendix A hereto. Concerning the tariff petitioner further says, page 12, "This, in the language of the day, caught the shipper 'coming and going' ". There was, in other words, no possible dispute as to the meaning of the tariff.

ARGUMENT

I.

The petition shows no special or important reasons why the writ should issue.

1. The petition fails to show any special or important reasons why the writ should issue. It fails particularly to show wherein there is involved a "federal question of substance not theretofore determined by this court", as suggested by Section 5(a) of Rule 38.

The eight points set forth on pages 4 and 5 of the petition as "Reasons Relied Upon for the Granting of the Writ" raise no federal question beyond the determination of what tariff rates apply to the transportation of Beacon's mixed feed in interstate commerce; even this question is not shown to be one of substance.

The "Summary of Argument" appearing on pages 7 and 8 of the brief states the principal issue to be whether or not the New York Court of Appeals erred in construing orders of the Commission affecting Beacon's freight charges. We call attention to the fact that one of the orders involved, that issued by the Commission on March 26, 1935, in *Ex Parte 115,* and all of the tariffs issued pursuant thereto, expired December 31, 1936. It does not appear anywhere in the petition that other parties have an interest or that there is any large question of principle involved in a controversy pertaining to one shipper's charges levied under orders and tariffs long since withdrawn.

2. The petition fails to show in what manner a state court had decided a federal question of substance "in a way probably not in accord with the applicable decisions of this court", as suggested by Section 5(a) of Rule 38.

No federal case in conflict with the state court's opinion is referred to in the eight points set forth on pages 4 and 5 of the petition as reasons for the granting of the writ. Under summary of argument, page 8 of the brief, seven

miscellaneous cases are listed as being "applicable and persuasive", but upon examination they prove to be most inapplicable and not at all persuasive. They give no support, obliquely or otherwise, to petition's contention that a court may refuse to enforce the plain provisions of a tariff on the grounds that the tariff, though duly filed and published, violates some order of the Commission. The cases turn on divers points, such as the construction to be given to the language of a tariff (*Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285); whether it is constitutional to permit carriers to levy a penalty charge, so-called, for car detention in a demurrage tariff (*Turner, D. & L. Lumber Co.* v. *Chicago, M. & St. P. R. Co.*, 271 U. S. 259); whether an order permitting a railroad to abandon a line may abrogate private contracts (*Central New England R. Co.* v. *Boston & Albany R. Co.*, 279 U. S. 415); whether the Commission in its quasi-judicial capacity may award reparation upon finding unreasonable a rate it previously established in its quasi-legislative capacity (*Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370); whether the United States Shipping Board had exclusive jurisdiction over agreements between carriers alleged to be in violation of the anti-trust laws (*United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474); whether a court in reviewing a reparation order of the Commission is bound by the Commission's interpretation of a tariff (*Brown & Sons Lumber Co.* v. *Louisville & N. R. Co.*, 299 U. S. 393); whether a carrier may obtain a judgment for undercharges while the shipper is endeavoring to procure reparation in a proceeding before the Commission (*Crancer* v. *Lowden*, 315 U. S. 631).

Nothing in these cases indicates that the New York Court of Appeals in deciding that Beacon was bound to pay the tariff charges and should seek its remedy, if any, before the Commission, was acting contrary to the applicable decisions of this Court. As will be demonstrated later herein, the Court in so deciding was acting in accord with the applicable decisions of this Court.

II.

Certiorari should not be granted to review a judgment for freight charges entered in strict accord with the terms of a published tariff.

Whether the Commission did in fact authorize emergency charges on Beacon's shipments in *Ex Parte 115* and whether such emergency charges were published in violation of an outstanding order in the *Beacon* case, referred to later herein, need not be considered at this point. The fact of paramount importance is that the charges sued for were assessed in strict accordance with the tariffs and thus are the legal charges.

Interstate rates named in tariffs lawfully on file with the Interstate Commerce Commission are the legal rates. In *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, the Court said, page 197:

> "* * * The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it has charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, § 2; March 2, 1889, 25 Stat. 855, c. 382, § 6. *Armour Co.* v. *United States*, 209 U. S. 56, 83). The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

The principle set forth in the above statement is the corner stone of the federal system of rate regulation. It

is repeated and enlarged upon in numerous other cases, such as:

Robinson v. *Baltimore & Ohio R. Co.*, 222 U. S. 506;
Louisville & Nashville R. Co. v. *Maxwell*, 237 U. S. 94;
Pittsburgh C. C. & St. L. Ry. Co. v. *Fink*, 250 U. S. 577;
New York Central & H. R. Co. v. *York and Whitney*, 256 U. S. 406;
Davis v. *Portland Feed Co.*, 264 U. S. 403;
Lowden, et al. v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516;
Arizona Grocery Co. v. *Atchison, Topeka & Santa Fe R. Co.*, 284 U. S. 370.

One of the latest pronouncements is in *Yakus* v. *United States*, 321 U. S. 414, where, by way of illustration, the Chief Justice said, page 445:

> "For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U. S. C. §§ (6(7), 10 (1); *Armour Packing Co.* v. *United States*, 209 U. S. 56, 81; *United States* v. *Adams Express Co.*, 229 U. S. 381, 388. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution. *United States* v. *Vacuum Oil Co.*, 158 F. 536, 539-41; *Lehigh Valley R. Co.* v. *United States*, 188 F. 879, 887-8. See also *United States* v. *Standard Oil Co.*, 155 F.

305, 309-10, reversed on other grounds, 164 F. 376, Compare *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196-7; *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 384."

III.

The merits of petitioner's claim do not warrant issuance of the writ.

This point considers the merits of the claim made by the petitioner that the charges sued for were not authorized by the Commission's orders in *Emergency Freight Charges, 1935, Ex Parte 115*, 208 I. C. C. 4, 215 I. C. C. 439, and were published in violation of the Commission's order in *Beacon Milling Co., Inc.* v. *New York Central R. Co.*, 157 I. C. C. 635. The respondent's position is that the charges sued for were authorized by the Commission and were not published in violation of any order of the Commission.

By its orders in *Ex Parte 115* the Commission authorized the carriers to place an emergency charge on animal and poultry feed (R. 43). Beacon shipped such feed out of Cayuga. Even though normal rates on the transited product were on the grain basis, the product was as a matter of fact animal or poultry feed. Without the transit privilege the local rate on the animal or poultry feed would apply from Cayuga to final destination. In order to obtain any emergency charge on such animal or poultry feed handled under transit provisions of the tariff it was necessary for the carriers to add the emergency charge to the going rate that was assessed for the entire transportation, *i. e.*, the through rate.

The carriers interpreted the Commission's inclusion of animal and poultry feed in the list of products taking the maximum emergency charge as an indication

that the Commission intended that this product could and should bear an increased charge. The basis on which normal freight charges, as distinguished from emergency charges, were computed on transit shipments, was not alluded to. Indeed the whole subject of transit was omitted in the Commission's report. The carriers were left free to carry out the details of the Commission's authorization, subject, of course, to the continuing supervision and control of the Commission.

The Commission accepted the master tariff for filing. Item 70 of that tariff provided a uniform method of applying the emergency charge to transit shipments, viz.: if an emergency charge was authorized on either the inbound or the outbound commodity, then the charges were to be added to the through rate. All shippers were thus treated alike and the carriers secured maximum revenue to meet an emergency confronting them. May a court now say that the carriers were wrong in their interpretation of the order and that the Commission should have suspended the tariff, or the particular item?

It is reasonable to believe that if the rule promulgated by the carriers was not in conformity with the order the Commission itself would have suspended it and prevented it from ever going into effect. The Commission not only accepted the master tariff for filing, but in a further hearing more than a year later authorized extension of the charges for an additional six months (215 I. C. C. 439). Its second report indicated, page 445, that the master tariff published by the carriers had carried the authorized increases; page 453, that the animal and poultry feed people had been heard to protest; page 464, that the Commission was satisfied as to the apportionment of the increases between particular commodities; page 464, that though making changes in cer-

tain of the charges it did not affect the basis then being charged on animal or poultry feed; and, page 467, that continuation of the existing charges was authorized until December 31, 1936. These statements permit the inference that the increases already in effect for a year were those originally authorized by the Commission. In any event, here was the time for the petitioners to complain.

While the Commission's orders were permissive in respect to the emergency rates, they were also enabling. Outstanding orders in prior cases were modified for the benefit of carriers desiring to take advantage of the permission to increase their rates. All outstanding unexpired orders of the Commission authorizing or prescribing rates and charges were amended "to the extent necessary to permit the emergency charges herein authorized to be applied to the rates and charges authorized or prescribed in or maintained or held by virtue of said outstanding orders * * *" (R. 50). This was intended to remove the bar that might have otherwise existed under outstanding orders of the Commission prescribing rates. It was made plain that these orders were not to act as a holddown or impediment to the application of a uniform or general increase in rates. If the *Beacon* order was still outstanding, it was modified, as were all other outstanding orders, to the extent necessary to permit a general increase to take place.

The *Beacon* decision, as has already been pointed out, required that the carriers' tariffs providing for assessment of Beacon's through rates on the animal or poultry feed basis be amended to provide for assessment on the grain basis in order to place Beacon on a competitive equality with mills in other territories. These mills had an advantage under the old arrangement because the grain rates they used were lower than the feed rates Beacon used. The order in the case gave Beacon just

what its competitors had, plus the necessary protection of a continuing order. However, under Beacon's theory of this case, such order protects Beacon, not from receiving less favorable treatment than its competitors, which was its purpose, but from having a general increase apply to its through rates.

Beacon's position amounts to no more than this: "The outstanding order issued in our case in 1929 protects us from the *Ex Parte 115* increases of 1935, and we are not at all concerned that our competitors, for lack of an order protecting them, are exposed to the increases." It is not a matter of proving that Beacon's competitors have paid the charges, though this would have been helpful had it been done, but rather whether the interpretation of an order is reasonable that makes such a result possible. A simple answer is that the *Beacon* order was amended along with all others so that all could be treated alike.

IV.

Certiorari should not be granted to review administrative issues of the type raised herein in the absence of preliminary resort to the Interstate Commerce Commission.

The contention raised in Point VI, page 16, of petitioner's brief that the identical question was raised and an administrative determination secured in the *Beacon* case in 1929 has no merit and may be taken as an admission that an administrative ruling is necessary. The only administrative ruling made in the *Beacon* case in 1929, as is pointed out herein, page 5, pertained to a competitive situation that was then presented to the Commission. The present controversy arose six years later. It concerns other tariffs, published at a different time, under different conditions, and for a different purpose. The administra-

tive ruling Beacon needs, but has never obtained, pertains to the reasonableness and lawfulness of Item 70 of the master tariff under which the charges were assessed.

There is no precedent or reason for permitting a court to go behind the terms of a published tariff in the absence of preliminary resort to the Commission, and find its provisions unlawful as applied to a particular shipper. Preliminary resort to the Commission is necessary in order that the tariff rates may be enforced with uniformity until corrected in accordance with the statute. Violations of the statute as to preferences and discriminations would inevitably follow unless the requirement of a uniform standard of rates is complied with. If, without prior action by the Commission, a court could determine that a published rate was unlawful, it would follow that unless all courts reached an identical conclusion a uniform standard of rates would be impossible. The standard would fluctuate and vary depending upon the divergent conclusions reached by various courts as to whether the published rates were in conformity with the Commission's orders. To recognize such a power in the courts would be wholly inconsistent with the administrative power conferred upon the Commission and with the statute's requirement that uniformity and equality of rates be observed.

This view has been consistently maintained by this Court, both preceding and following the leading case of *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. It makes no difference whether a shipper is endeavoring to recover damages on account of the rates being unreasonable or otherwise in violation of the Interstate Commerce Act, or whether a carrier is suing for its charges under the published tariff. In the former case, as in the *Abilene Cotton Oil* decision, the shipper's suit falls for lack of preliminary determination of the administrative issue by the Commission, while in the latter case, as in *Crancer* v. *Lowden*, 315 U. S. 631, the carrier may recover its

published charges, leaving the shipper his independent remedy for reparation before the Commission. That is exactly the disposition made of this case by the Court of Appeals of the State of New York. Judgment was "without prejudice to any proceedings which the defendant may hereafter institute before the Interstate Commerce Commission" (R. 57). This disposition of the case was in entire accord with the decisions of this Court.

CONCLUSION

The application for writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent.

HAROLD H. MCLEAN,
Counsel.

Dated, November 13, 1944.